Constitutional Pluralism between Normative Theory and Empirical Fact

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It has been recently floated in legal academia and the blogosphere that it is high time for constitutional pluralism to bow out of the European scene. The reason? It has been alleged to be (1) “fundamentally flawed and unsustainable” for allowing the application of EU law to be selective and unequal and (2) prone to abuse by autocrats, as demonstrated by the ongoing dismantling of democracy and the rule of law in Hungary and Poland where national (“constitutional”) identity is invoked all too often to justify patently illiberal policies.

Is constitutional pluralism really to blame? What is this beast anyway? In this short comment I would like to make a fairly straightforward but fundamental difference in approaching constitutional pluralism as an “is” or an “ought”[1)] Critical theorists and many psychologists might object to the very possibility of distinguishing the “is” from the “ought” – what is out there in the world and what should be. I maintain that this distinction is rationally possible even if in many situations our perception of “is” is tainted by our normative standpoint (the “should”).. I would argue that regardless of one’s perspective on the latter, constitutional pluralism is at least to some extent an empirical fact in the EU, one that needs to be reckoned with whatever our misgivings about the actions of Polish and Hungarian autocrats. I believe we should resist our “oughts” cloud the “is” of the European constitutional constellation.

Constitutional pluralism as a normative theory

It is far beyond the scope of this text to discuss the voluminous academic literature on constitutional pluralism. Surely, not all authors writing within that tradition have stipulated that constitutional pluralism is not merely the observable state of affairs, but in fact the desired one. However, the normative scholarship – and here normative is taken in its most common social science sense of signifying “ought” as distinct from “is” (which is empirical) – which emphasized that constitutional pluralism is the “right” state of affairs, is not illusory.

It would seem to me to be a perfectly legitimate – if debatable – theoretical standpoint that a heterarchical (pluralist) arrangement can be preferable to a hierarchical one, with each supporting at least partially different sets of beliefs about the world. In the case of constitutional pluralism in Europe, a simplified normative assertion might be that it is preferable that the ultimate seat of judicial authority differs – within discernible and mutually agreed limits – per level in a multi-layered polity, as this way diverging local preferences need not be inevitably stamped out for the sake of uniformity by a single judicial authority (imposing its own preferences on everyone, which impacts some more than others). The underlying belief might be

that local preferences – cultural, legal, political – are worth protecting (once again, within limits).

The autocratic governments of Hungary and Poland are of course taking this normative position to its boundaries, or more precisely, beyond. Most constitutional pluralists would agree that there are constraints on how much latitude different seats of authority are entitled to within a given polity. This could hardly accommodate a challenge to the basic communicative mechanism of Article 267 TFEU as recently proposed in Poland. If we say that judicial independence is one such constraint for coexistence within the EU, then the Member States need to respect it, even if different ways of operationalizing the commitment might exist. There is no respectable interpretation of judicial independence which the actions of the Polish and Hungarian governments could conform to.

As a side-note, I am also not entirely convinced by the occasionally advanced argument that pluralist scholars have “empowered” Polish and Hungarian autocrats with their ideas. Any idea is potentially prone to misuse and misinterpretation, especially by autocratic regimes. Pluralist scholars have certainly not developed their normative theory to serve autocrats. That their scholarship and positions have been adopted by autocrats might force them to re-evaluate their worldviews and perhaps emphasize common constraints within constitutional pluralism but generally going by what autocrats and kleptocrats say is probably not a great guide to doing academic research.

Constitutional pluralism as an empirical fact

In any case, it is not my point here to defend the normative standpoint of constitutional pluralism (to which I do not particularly subscribe); that endeavour is best left to normative theorists. On the contrary, I think that regardless of where one stands on the normative spectrum – how should the EU be constitutionally organized? – it should be possible to agree that constitutional pluralism is to some extent an empirical fact of life within the EU as it exists at the moment.

The most obvious evidence for this (alleged) fact can be found in the Treaties. Article 4(2) TEU explicitly tells the EU to respect Member States’ national identities. If national identities imply constitutional identities, then some (unspecified) idea of constitutional pluralism was intentionally hard-wired into the Treaties by the Member States. What, on the contrary, was distinctly not included in the Treaty of Lisbon is the codification of the principle of supremacy of EU law over national law. Both the national identity and the supremacy clause were part of the Constitution Treaty (Article I-5 and 6 respectively) but only the former survived the redaction that followed popular rejection in France and the Netherlands in 2005, with the supremacy text ostensibly relegated to a non-binding declaration. On this reading, recognizing constitutional pluralism, albeit without specifying it, was a response to domestic democratic preferences.

While Member States tip-toe on committing to hierarchical federalism, national judiciaries occasionally openly defy the rulings of the self-appointed European

supreme court. The *Ajos* saga is perhaps the most obvious and recent example here but there are others. What is notable about these instances of defiance is that they were perpetrated by courts from European legal systems with stellar reputations, so authoritarian motivations can be safely ruled out. Cases of defiance anecdotally demonstrate that judicial actors, just as political actors, do not take kindly to being marginalized – even if they could not admit it, they seek to preserve their power where possible, and the purposive ambiguity of the EU Treaties on the point of supremacy certainly puts national courts in a stronger position vis-à-vis the CJEU. Even where outright defiance does not occur, national courts might intentionally diverge from CJEU case law. We know very little about the extent to which this happens, as scholarship is lopsidedly focused on CJEU judgments, despite implementation of EU law and preliminary rulings taking place at national level. It is clear, however, that there are significant “black holes” in the EU when it comes to the application of EU law.

Supremacy of a higher legal order over a lower one – EU over national law – is a functional necessity for a given polity to operate in a relatively uniform and equal manner. But even if taken as necessary in a certain context, uniformity and equality are normative objectives, the opposites to some degree of normative pluralism. A hierarchy of laws and courts might underlie EU integration for it to be functional – thus *Costa* – but the absence of an explicit commitment to it on the part of all Member States is on the one hand an indication of their normative standpoint and, on the other, it leaves spaces for legal pluralism to operate as a matter of fact. Does this make it more difficult for the EU to ensure that all Member States abide by its fundamental values? Probably. We might deem this state of affairs undesirable – it *ought* not exist – but it does, and it has less to do with constitutional pluralists, even the normative ones, and more with the designers of the EU.

References

- 1. Critical theorists and many psychologists might object to the very possibility of distinguishing the “is” from the “ought” – what is out there in the world and what should be. I maintain that this distinction is rationally possible even if in many situations our perception of “is” is tainted by our normative standpoint (the “should”).
